

BEFORE THE FOREST PRACTICES APPEALS BOARD  
STATE OF WASHINGTON

RICHARD M. BUSH,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF NATURAL  
RESOURCES,

Respondent.

FPAB NO. 05-005

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER

A hearing was held in the above matter on December 1, 2005, at the Board's office in Lacey, Washington. The Appellant, Richard M. Bush, is challenging the Department of Natural Resources' (DNR) approval of a forest practices application for a DNR timber sale in Clallam County.

The Forest Practices Appeals Board was comprised of Tom P. May, Chair, and Members Joel Rupley and John Giese. Administrative Appeals Judge, Kay M. Brown presided over the hearing. Gene Barker and Associates of Olympia, Washington, provided court reporting services. Mr. Bush represented himself. The DNR appeared through its attorney, Edward D. Callow, Assistant Attorney General. The Board received sworn testimony of witnesses, examined exhibits, and heard argument on behalf of the parties. Having fully considered this record, the Board enters the following:

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER  
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1 Facts

2 I.

3 On June 5, 2005, DNR approved Forest Practices Application No. 2606740 for a DNR  
4 timber sale referred to as the “Catamount” Timber Sale. The permit allows forest practices on  
5 four units totaling 154 acres located on State Trust Lands on the Miller Peninsula in Clallam  
6 County. *Testimony of Benner, Goodwin, Exs. R-1 through R-5.*

7 II.

8 Miller Peninsula is located on the northeastern corner of the Olympic Peninsula. It is  
9 bordered on three sides by salt water, and is separated from the rest of the Olympic Peninsula by  
10 a major highway, Highway 101. Units 1 and 2 of the Timber Sale are located to the north of  
11 Highway 101. Portions of the southern boundary of Unit 2 come close to bordering Highway  
12 101, and the harvest of that unit would result in trees being removed near the highway<sup>1</sup>. Units 3  
13 and 4 are located to the south of Highway 101. *Testimony of Bush, Benner, Goodwin, Exs. R-1*  
14 *through R-5.*

15 III.

16 The Catamount Timber Sale was designed to be consistent with the State Habitat  
17 Conservation Plan (HCP). The HCP is a formal agreement between DNR and the U.S. Fish and  
18 Wildlife Service. It is intended to allow timber harvest to occur while protecting threatened and  
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21 <sup>1</sup> There is an old road and an abandoned railroad between the border of Unit 2 and Highway 101.

1 endangered species. The HCP contains requirements and restrictions above and beyond the  
2 Forest Practices Rules. *Testimony of Benner.*

3 IV.

4 The four units contained in the sale range in size between approximately 11 acres (Unit  
5 4) to approximately 66 acres (Unit 1). The units will be clear-cut; however 8 trees per acre will  
6 remain for leave trees. The leave trees were selected to be the old growth residual trees and  
7 other older trees with unique structures preferred by wildlife such as large limbs and broken tops.  
8 The timber sale contract also directs the purchaser to leave snags and down wood on the site  
9 following the harvest. *Testimony of Benner, Exs. R-1 through R-7.*

10 V.

11 Aquatic features contained in the units were considered by DNR when designing the sale.  
12 Several small, forested wetlands, mostly located within Unit 2, were protected with clumps of  
13 leave trees, although the wetlands were too small to require formal buffering. A type four stream  
14 located between Units 3 and 4 was protected with a 100-foot buffer on each side of the stream.  
15 *Testimony of Benner, Exs. R-1 through R-7.*

16 VI.

17 The sale was also screened by DNR for potential implications for threatened and  
18 endangered species. The screening located the exterior arc of a spotted owl circle near Units 3  
19 and 4. The outer edge of the circle was carefully delineated to ensure that no logging would  
20 intrude into the circle. Units 3 and 4 were also found to contain marbled murrelet release habitat.

1 DNR determined that the habitat could be harvested consistent with the requirements of the  
2 HCP, based on the number of acres of habitat remaining in the watershed analysis unit.

3 *Testimony of Benner, Exs. R-1 through R-7.*

4 VII.

5 The DNR's decision to sell the timber was subject to SEPA review and a SEPA checklist  
6 was completed. In answer to a question on the checklist asking about animals that have been  
7 observed on or near the site, or are known to be on or near the site, the DNR listed songbirds,  
8 piliated woodpeckers, deer, bear, and mountain beaver. No unique habitats were designated. In  
9 completing this checklist, DNR doesn't do an exhaustive search for species on site. Instead, it  
10 lists the species it has actually seen using the site, or for which it has seen evidence of usage on  
11 the site. It also checks the computer data base systems available to it (trax and the priority  
12 habitat species data base) for other information on wildlife. *Testimony of Benner, Ex. R-2.*

13 VIII.

14 Cougars are found in the area of the Catamount Timber Sale. Mr. Bush saw a cougar at  
15 his house, which is near Unit 1. DNR does not dispute that cougars use the site, but cougar use  
16 does not trigger any special policies or protections in the HCP. The HCP is designed to protect  
17 certain "indicator" species. The intention is that by protecting these indicator species, other  
18 wildlife will be protected as well. *Testimony of Benner, Ex. R-2.*

IX.

Mr. Bush's primary concern with the timber sale is that it will prevent larger animals, especially cougar, from crossing Highway 101 and accessing Miller Peninsula. He believes that the larger animals need tree cover to hide in while approaching the road. It is also his opinion that the problems animals have crossing the road will be exacerbated by the planned widening of Highway 101 to four lanes. The anticipated roadwork is scheduled for construction in the 2007 to 2009 biennium. *Testimony of Bush, Ex. A-15.*

X.

Jack Smith is a regional wildlife program manager with Washington State Department of Fish and Wildlife in Montesano. Mr. Smith's area of expertise is with big game on the Olympic Peninsula. His primary emphasis has been on deer and elk, but he is also familiar with cougar and bear. Mr. Smith has reviewed the forest practices application and SEPA information on the Catamount Timber Sale and also the SEPA information on the Catamount Timber Sale. Overall, Mr. Smith's impression of the timber sale is that it was designed in a manner favorable to wildlife. *Testimony of Smith.*

XI.

Mr. Smith agrees with Mr. Bush that the widening of Highway 101 will not be good for wildlife. However, it is his opinion that removal of trees near the highway is beneficial to cougars and other big game. He bases this opinion on the fact that the primary cause of death for cougars is being killed by cars on roadways. By clearing off the trees near the roadways, drivers

1 have a better chance of seeing the cougar approaching the road, thereby increasing the chance  
2 that they can avoid an accident with the cougar. The Board finds Mr. Smith's opinion credible  
3 and persuasive, and based on that opinion finds that removal of the trees next to the highway will  
4 not have a negative impact on wildlife. *Testimony of Smith.*

## 5 XII.

6 Mr. Smith also opined that the sale, as designed, would not have a negative impact on  
7 deer or elk. In his opinion, removal of tree cover increases foraging area for deer and elk. On  
8 the Olympic peninsula, lack of forage is a primary limiting factor for deer and elk. Increase of  
9 foraging area, by opening up areas of the forest to sunlight, is generally good for foraging  
10 animals so long as the size of the openings does not exceed 100 acres. The Board finds Mr.  
11 Smith's opinion credible and persuasive, and based on that opinion finds that the proposed  
12 harvest will not have a negative impact on deer and elk. *Testimony of Smith.*

## 13 XIII.

14 Mr. Smith also testified that the proposed timber harvest would be generally beneficial to  
15 bear. Bears feed in early successional forests, because there is more forage available in these  
16 forests. Also, the large leave trees left on the site will be beneficial to bears. The Board finds  
17 Mr. Smith's opinion credible and persuasive, and based on that opinion finds that the proposed  
18 harvest will not have a negative impact on bears. *Testimony of Smith.*

1 XIV.

2 Mr. Bush believes that the Miller Peninsula area is also a winter range area for big game.  
3 He bases this opinion on the fact that he has seen cougars and bears on Miller Peninsula in the  
4 winter. *Testimony of Bush.*

5 XV.

6 To a wildlife biologist like Mr. Smith, a big game winter range is an area to which hoofed  
7 herbivores, such as deer and elk, move when they are forced out of their normal areas due to  
8 deep snow. A characteristic of a big game winter range is that the density of the animals in the  
9 area is higher than in normal areas. Mr. Smith does not believe that the proposed timber harvest  
10 units constitute big game winter range, in the technical sense of the term, even though Mr. Bush  
11 has seen animals using these areas in the winter. Rather, he believes the units are year round  
12 habitat for big game species. The Board finds Mr. Smith's opinion credible and persuasive, and  
13 based on that opinion finds that the proposed timber harvest units do not contain big game winter  
14 range. *Testimony of Smith.*

15 XVI.

16 Although the term big game can apply to predators like cougars, Mr. Smith does not  
17 believe the concept of a big game winter range is applicable to cougars. His opinion is based on  
18 the fact that cougars have huge home ranges and are not restricted to small winter ranges, that  
19 unlike the hoofed herbivores they can travel over snow, and that at all times of the year the  
20 cougars go where their prey is. Likewise, he does not think the concept is applicable to bears

1 because bears primarily hibernate, or go into a deep sleep in the winter. The Board finds Mr.  
2 Smith's opinion credible and persuasive, and based on that opinion finds that the timber sale  
3 harvest units are not winter range habitat, in the technical meaning of the phrase, for cougars and  
4 bears. *Testimony of Smith.*

5 XVII.

6 Mr. Bush is also concerned about the impact of the proposed harvest on the many species  
7 of birds that live in the area. Mr. Bush, who is familiar with the Audubon Society 2005 bird  
8 count, testified that 27 species of birds were identified in the area. Mr. Bush believes that the  
9 harvest of trees will have an adverse impact on these birds. *Testimony of Bush.*

10 XVIII.

11 Scott Horton, DNR biologist, agrees with Mr. Bush that many species of birds inhabit the  
12 Miller Peninsula. He testified that approximately 60 species of upland terrestrial birds live  
13 across the area. In his opinion, individual birds will be displaced by the harvest. However, the  
14 harvest will not cause material damage to any of these bird species. The great majority of the  
15 birds living on the north Olympic Peninsula are continental in their distribution, and therefore  
16 impacts from this timber sale on the species would be too small to measure. The Board finds Mr.  
17 Horton's opinion credible and persuasive, and based on that opinion, finds that the proposed  
18 harvest will not cause material damage to any bird species. *Testimony of Horton.*



1 XIX.

2 Any conclusion of law deemed to be a finding of fact is adopted as such. Based on these  
3 findings, the board makes the following:

4 CONCLUSIONS OF LAW

5 I.

6 The Board has jurisdiction over the parties and the subject matter of this controversy  
7 under RCW 76.09.220. The appellants have the burden of proof. *Walker v. DNR*, FPAB No. 99-  
8 04 (1999).

9 II.

10 Two issues remain in the pre-hearing order on this appeal<sup>2</sup>:

- 11 1. Whether the DNR's approval and conditioning of FPA No. 2606740 was in  
12 conformity with WAC 222-30-020(10)?  
13 2. Whether FPA No. 2606740 is appropriately conditioned to protect wildlife?

14 Big Game Winter Range (WAC 222-30-020(10)(b))

15 III.

16 Mr. Bush argues in his appeal that the approved forest practice does not comply with  
17 WAC 222-30-020(10)(b). This rule states:

18 (10) Wildlife habitat. This subsection is designed to encourage timber harvest practices  
19 that would protect wildlife habitats, provided, that such action shall not unreasonably  
20 restrict landowners action without compensation.

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21 <sup>2</sup> A third issue pertaining to SEPA was dismissed by the Board on summary judgment.

1 . . .

2 (b) Harvesting methods and patterns in established big game winter ranges should be  
3 designed to ensure adequate access routes and escape cover where practical.

4 (i) Where practical, cutting units should be designed to conform with topographical  
5 features.

6 (ii) Where practical on established big game winter ranges, cutting units should be  
7 dispersed over the area to provide cover, access for wildlife, and to increase edge effect.

#### 8 IV.

9 The threshold question raised is whether the harvest units in the Catamount Sale contain  
10 big game winter range. The Board concludes, based on the factual evidence presented in this  
11 appeal, that the harvest units are not being used by big game as established winter range areas.  
12 Further, the units do not contain areas that have been designated as established big game winter  
13 range by the Department of Fish and Wildlife. Therefore, the Board concludes that this rule is  
14 inapplicable to this appeal.

#### 15 Material damage to wildlife.

#### 16 V.

17 The second issue raised by Mr. Bush is whether the forest practices application for the  
18 Catamount Timber Sale is appropriately conditioned to prevent material damage to wildlife.

#### 19 VI.

20 DNR has the authority to condition applications "to avoid material damage to a public  
21 resource." *Long v. DNR, et.al.*, FPAB No. 94-5 (June 22, 1994)(CL III); see also RCW  
76.09.080(1)(c) and RCW 76.09.090. Public resources include wildlife. RCW 76.09.020(19).

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1 Conditions imposed to prevent material damage to wildlife must be site-specific, and may go  
2 beyond standard forest practices rules, if necessary. *Long* at CL III.

3 VII.

4 The Board has stated in past decisions that any timber harvest displaces some wildlife.  
5 The protection afforded to wildlife under the Forest Practices Act is protection for the species,  
6 not the individual or pair of individuals. *Confederated Tribes and Bands of the Yakama Indian*  
7 *Nation v. Washington Department of Natural Resources et. al.*, FPAB No. 97-11 (December 9,  
8 1998)(CL VII.)

9 VIII.

10 Here, although some individual members of some bird species will be displaced by this  
11 timber harvest, the Board concludes that there will be no impact to the broader populations of the  
12 numerous species of birds that inhabit the area. The Board also concludes that the harvest will, if  
13 anything, be beneficial to deer, elk, and bears. The removal of the trees along the highway could  
14 decrease cougar deaths from cars.<sup>3</sup> Overall, the Board concludes that the evidence does not  
15 establish that there will be material damage to any species of wildlife that uses this site.  
16 Therefore, the Board concludes that no additional site-specific conditions are necessary to  
17 prevent material damage to wildlife.

18 IX.

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20 <sup>3</sup> The Board, in its decision, does not address the future impacts of the proposed widening of the highway on  
21 wildlife. Hopefully, these impacts will be considered by the Department of Transportation prior to approving the  
widening of Highway 101.

1 No evidence was presented to the Board that the proposed forest practices would have an  
2 adverse impact on any threatened or endangered species. To the contrary, the DNR presented  
3 evidence that Catamount Timber Sale was consistent with all forest practice rules and the  
4 requirements of the HCP. Therefore, the Board concludes the Catamount Timber Sale will not  
5 cause material damage to any threatened or endangered species.

6 X.

7 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

8 From the foregoing, the Board issues this:

9 ORDER

10 The DNR's approval of Forest Practices Application No. 2606740 for the DNR  
11 Catamount Timber Sale is affirmed. Mr. Bush's appeal is dismissed.

12 SO ORDERED this 17<sup>th</sup> day of January 2006.

13 **FOREST PRACTICES APPEALS BOARD**

14 Joel Rupley, Member

15 John Giese, Member

16 Kay M. Brown  
17 Administrative Appeals Judge, Presiding

18 DISSENT

19 I respectfully disagree with the other members.  
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1           1.       Substantial and sufficient evidence was presented by Mr. Bush to prove that no  
2 scientific study has been conducted to exclude the area in question from being determined to be  
3 an “established big game winter” range. Based on many years of Mr. Bush’s on-site  
4 observations, it is clear that big game are, in fact and reality, established and living on the area in  
5 question in the winter. DNR came into the hearing saying that “established” meant “designated”  
6 by humans, apparently regardless of what the animals are doing in fact. Mr. Bush’s testimony is  
7 more credible, and based thereon this decision-maker would require proper empirical data and  
8 scientific review.

9           2.       The impacts of the timber sale in conjunction with the current status and proven,  
10 planned expansion of Highway 101, have not been analyzed, much less mitigated or planned for.  
11 Absent a hearing, DNR’s position to Mr. Bush was that DNR had no proof of such expansion,  
12 when the facts were the opposite.

13           3.       The overall analysis of DNR on this FPA was at best, cursory, and was  
14 contradicted by the evidence and testimony from Mr. Bush in regard to plant and animal species  
15 on-site. Experts are helpful when their opinions are based on empirical data from the area in  
16 question. Here the opinions were general and conclusion driven, and therefore did not persuade  
17 one that the opinions were anything more than unconvincing appeals to authority, offered to  
18 contradict Mr. Bush’s factual observations.

19           4        I dissent from adopting the opinions of the “experts” in this case. Mr. Bush’s first  
20 hand preponderance of the evidence is not rebutted by the DNR bringing in “experts” to state  
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1 opinions which purport to contradict the observed facts. Absent an analysis by the decision  
2 maker of what factually and actually occurs at the site, the result is that parties financially able to  
3 harness “experts” will always prevail. Based on this factual analysis standard, Mr. Bush  
4 prevails.

5 Dated this 17<sup>th</sup> day of January 2006.

6 Tom P. May, Chair  
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